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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,
8 Plaintiff,

9 -vs-

10 SCOT L. ASKHAM,

11 Defendant.

NO. CR-06-0082-WFN-1

ORDER

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13 Pending before the Court is Mr. Askham's 28 U.S.C. § 2255 Motion to Vacate,
14 Set Aside, or Correct Sentence, presented by Mr. Gerald Smith. Assistant United States
15 Attorney Robert Ellis represents the Government. An evidentiary hearing was held on
16 July 22, 2009. Mr. Smith called four witnesses: Lisa Warner-Askham, Charyl Warner,
17 Dennis Warner, and Scot Askham. The Government called three witnesses: Alan Baum,
18 David Miller, and Leland McEuen. The Court has considered the file, the briefings, and the
19 testimony, and is fully informed. For the reasons stated below, the Motion is denied.

20 **I. BACKGROUND**

21 On August 8, 2006, Mr. Askham was indicted in violation of 18 U.S.C. § 2252A(a)
22 (5)(B), Possession of Child Pornography [Count 1] and violation of 18 U.S.C. § 2252A(a)
23 (1),(2), Distribution of Child Pornography [Count 2]. Mr. David Miller filed a Notice of
24 Appearance on August 25, 2006. On July 10, 2007, Mr. Gregory Lockwood and Mr. Alan
25 Baum submitted a Notice of Withdrawal and Substitution. On August 7, 2007,
26 the Government filed a Second Superseding Indictment charging Mr. Askham with

1 (1) Possession of Child Pornography in violation of 18 U.S.C. § 2252A(a)(5)(B) [Count 1];
2 (2) Distribution of Child Pornography in violation of 18 U.S.C. § 2252A(a)(1),(2)
3 [Counts 2 and 4]; (3) Advertisement of Child Pornography in violation of 18 U.S.C.
4 § 2252A(a)(3)(B)(I) [Count 3] (4) Receipt of Child Pornography in violation of 18 U.S.C.
5 § 2251A(a)(2)(A)(B) [Count 5]; and (5), Forfeiture, 18 U.S.C. § 2253 [Count 6].

6 On September 10, 2007, Mr. Askham pled guilty to Count 2 of the Superseding
7 Indictment. The Court sentenced Mr. Askham to 84 months imprisonment and five years
8 supervised release on December 18, 2007.

9 II. ANALYSIS

10 To gain relief under 28 U.S.C. § 2255, a movant must establish that (1) he is in
11 custody under a sentence of this Court; (2) his request for relief was timely; and (3) that
12 either the sentence imposed is unconstitutional or violates federal law, this Court lacked
13 jurisdiction to impose the sentence, the sentence exceeds what is authorized by law, or
14 the sentence or judgment is otherwise open to collateral attack. 28 U.S.C. § 2255. Mr.
15 Askham established that he satisfies the first two prongs.

16 Mr. Askham argues that he satisfies the third prong of the statute because he
17 received ineffective of assistance of counsel and therefore his guilty plea and sentence was
18 unconstitutional. The four grounds raised by Mr. Askham are: (1) ineffective assistance of
19 counsel when counsel failed to adequately investigate; (2) ineffective assistance of counsel
20 when counsel failed to dispute or exclude evidence; (3) ineffective assistance of
21 counsel when counsel failed to adequately communicate and advise Mr. Askham with
22 respect to possible defenses; and (4) ineffective assistance of counsel when counsel failed
23 to aggressively pursue strategies and arguments to mitigate sentencing to the fullest extent
24 possible.

25 In order to a establish a Sixth Amendment claim based on ineffective assistance of
26 counsel, the movant must prove the two-prong test set forth in Strickland v. Washington.

1 *Duncan v. Ornoski*, 528 F.3d 1222, 1234 (9th Cir. 2008); *Strickland v. Washington*, 466
2 U.S. 668, 687 (1984). First, the movant must prove that counsel's performance was
3 deficient by showing that counsel's performance "fell below an objective standard of
4 reasonableness." *Duncan*, 528 F.3d at 1234; quoting *Strickland*, 466 U.S. at 688. "[A] court
5 must indulge a strong presumption that counsel's conduct falls within the wide range of
6 reasonable professional assistance; that is, the defendant must overcome the presumption,
7 that, under the circumstances, the challenged action might be considered sound trial
8 strategy." *Strickland*, 466 U.S. at 689.

9 Second, the movant must demonstrate that he was prejudiced by showing that "there
10 is a reasonable probability that, but for counsel's unprofessional errors, the result of the
11 proceeding would have been different." *Duncan*, 528 F.3d at 1234; quoting *Strickland*, 466
12 U.S. at 694. If the movant pleaded guilty, then he must show that "there is a reasonable
13 probability that, but for counsel's errors, he would not have pleaded guilty and would have
14 insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (holding that the
15 Strickland two-prong test applies to challenges of ineffective assistance of counsel in the
16 context of guilty pleas).

17 **A. Deficient Performance.**

18 **1. Ground One: Failure to Adequately Investigate.** In order to prevail on his
19 ineffective assistance of counsel claim based on failure to adequately investigate, Mr.
20 Askham must prove that his counsel's performance was deficient. In order to meet
21 the objective standard of reasonableness, counsel has a duty to investigate. *Duncan v.*
22 *Ornoski*, 528 F.3d 1222, 1234 (9th Cir. 2008). "[C]ounsel has a duty to make reasonable
23 investigations or to make a reasonable decision that makes particular investigations
24 unnecessary. In any ineffectiveness case, a particular decision not to investigate must be
25 directly assessed for reasonableness [under] all the circumstances" *Id.* at 1234. Courts
26 award attorneys considerable discretion when determining what to investigate; however,

1 attorneys must have a foundation for basing their decisions before deciding not to
2 investigate. *Id.* at 1235.

3 Mr. Miller's and Mr. Baum's representation did not fall below a reasonable
4 objective standard. Mr. Miller conducted reasonable pre-trial investigation; he reviewed the
5 images taken from Mr. Askham's computer and reviewed the discovery provided by the
6 Government. Mr. Miller also determined that an independent forensic analysis was not
7 necessary for three reasons: cost, Mr. Askham's signed statement, and his interview with
8 Mr. Askham. Further, although the Court recognizes that Mr. Miller made a mistake in his
9 legal analysis, the Court finds that this mistake does not constitute deficiency.

10 When Mr. Baum substituted for Mr. Miller, he obtained the pretrial
11 investigation completed by Mr. Miller by discussing the facts and images of the case
12 with Mr. Miller. Mr. Baum did not see an advantage to spending money on a forensic
13 analysis because Mr. Askham never denied having the images on his computer and, there-
14 fore, the result of the independent forensic analysis would not change anything.

15 **2. Ground Two: Failure to Dispute or Exclude Evidence.** Mr. Askham argues
16 that counsel failed to attack inaccuracies in the affidavit in support of the search warrant,
17 inaccuracies in the statement signed by Mr. Askham, and the lack of Miranda warnings given
18 to Mr. Askham, through the use of suppression motions.

19 Mr. Askham did not carry the burden of proof on his claims that counsel failed
20 to attack inaccuracies in the affidavit in support of the search warrant and the statement
21 signed by Mr. Askham, through suppression motions; therefore the Court cannot find that
22 counsel was ineffective. The movant has the burden of proof to establish by a
23 preponderance of the evidence that he has been deprived of his constitutional right to
24 effective assistance of counsel. *Walker v. Johnston*, 312 U.S. 275, 286 (1941). Mr. Askham,
25 did not present evidence in his Memorandum in Support of § 2255 Motion (Ct. Rec. 93) or
26 at the evidentiary hearing that inaccuracies existed in the affidavit in support of the search

1 warrant. There was also no evidence presented that there were inaccuracies in the statement
2 signed by Mr. Askham. On the contrary, the Government offered testimony from Mr. Miller
3 that there were no inaccuracies in the statement signed by Mr. Askham. However, the Court
4 finds that both Mr. Miller's and Mr. Baum's failure to assert the lack of Miranda warnings
5 did not fall below the objective standard of reasonableness. Mr. Miller reviewed the
6 statement of the FBI agent, discussed a possible Miranda violation with Mr. Askham, and
7 ultimately concluded that there was not a suppressible issue. Mr. Baum reviewed the FBI
8 report and did not find a Miranda challenge.

9 **3. Ground Three: Failure to Adequately Communicate.** Mr. Askham bases
10 his § 2255 Motion on advisement from Mr. Baum that if he did not plead guilty then he
11 would go to jail for ninety years. The Court does not accept that Mr. Baum made such a
12 statement, and finds that Mr. Miller and Mr. Baum adequately communicated with Mr.
13 Askham.

14 "Adequate consultation between attorney and client is an essential element
15 of competent representation of a criminal defendant." *Turner v. Duncan*, 158 F.3d 449,
16 458 (9th Cir. 1998); quoting *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983).
17 In *Turner*, the Ninth Circuit held that counsel was deficient when he spent only forty-five
18 minutes with his client prior to trial. *Turner*, 158 F.3d at 458. In *Correll v. Stewart*, the
19 Ninth Circuit held that the attorney was deficient when he met with his client for only five
20 minutes between the guilt and penalty phases. *Correll v. Stewart*, 137 F.3d 1404, 1412 (9th
21 Cir. 1998). When communicating with a defendant regarding his guilty plea, the Ninth
22 Circuit has established that counsel must make more than a "mere inaccurate prediction" to
23 be found deficient. *Sophanthavong v. Palmateer*, 378 F.3d 859, 868 (9th Cir. 2004). In
24 advising his client, the attorney must grossly mischaracterize the outcome of the plea
25 agreement and give "erroneous advice on the probable effects of going to trial." *Id.*; quoting
26 *Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir. 1986).

1 Mr. Miller and Mr. Baum were not deficient because they adequately
2 communicated with Mr. Askham. Mr. Miller had personal meetings with Mr. Askham,
3 phone conversations and email correspondence. When Mr. Miller received the proposed
4 plea agreement from Assistant United States Attorney Jared Kimball, he discussed the plea
5 agreement and sentencing guidelines with Mr. Askham. The plea agreement was further
6 discussed when Mr. Baum substituted for Mr. Miller. Although Mr. Baum only had two
7 personal meetings with Mr. Askham, he had several telephone conversations and email
8 correspondences. In reviewing the plea agreement, Mr. Baum discussed the pros and cons
9 of pleading guilty and going to trial with Mr. Askham. Mr. Baum also discussed with Mr.
10 Askham the sentencing guidelines and how going to trial on a count of advertising child
11 pornography carried a statutory minimum of fifteen years. Mr. Baum further advised Mr.
12 Askham that it would be disadvantageous to go to trial because he would be facing a
13 statutory minimum of fifteen years and would lose the acceptance of responsibility. Based
14 on his experience and analysis of the case, Mr. Baum urged Mr. Askham to plead. Lastly,
15 the Court does not accept that Mr. Baum told Mr. Askham that he would face a ninety year
16 sentence if he chose to go to trial. Mr. Baum is a certified criminal law specialist, who has
17 been practicing criminal law for forty-one years and the Court does not accept that Mr. Baum
18 would make such a statement.

19 **4. Ground Four: Failure to Aggressively Pursue Strategies and Arguments**
20 **to Mitigate Sentencing.** The right to effective assistance of counsel extends to "all critical
21 stages of the criminal process," which includes sentencing. *Summerlin v. Schriro*, 427 F.3d
22 623, 629 (9th Cir. 2005). Mr. Askham argues that his counsel was ineffective because he
23 failed to file objections to the Presentence Investigation Report [PSR] and failed to file a
24 motion for departure. The Court finds that Mr. Baum's representation was not deficient
25 and his decision not to file objections to the PSR or a motion for departure was part of
26 Mr. Baum's strategy.

1 It is clear from the record that the Plea Agreement calculation of 97 to 121
2 months (Ct. Rec. 75) was already a significant variance from the guideline calculation of 210
3 to 262 months contained in the PSR. The Court cannot say the PSR guideline calculation is
4 wrong. Mr. Baum found that the most appropriate approach was to persuade the Judge to
5 sentence Mr. Askham to the low-end of the contemplated range of the Plea Agreement
6 and not to ask for an even lower sentence because the PSR range came in much higher than
7 the parties predicted. In mitigating Mr. Askham's sentence, Mr. Baum asked Mr. Askham
8 to collect character references, but advised Mr. Askham to remove certain sections because
9 they suggested that Mr. Askham was not accepting responsibility. Mr. Baum advised Mr.
10 Askham to edit the letters because he wanted to ensure that Mr. Askham received acceptance
11 of responsibility. Further, Mr. Baum did not want family members to testify because they
12 get emotional at sentencing hearings and he did not want to undermine Mr. Askham's
13 acceptance of responsibility.

14 **B. Prejudice.**

15 The Court found that Mr. Miller's and Mr. Baum's representation was not deficient;
16 therefore, the analysis does not proceed to determine whether Mr. Askham was prejudiced.

17 **III. CERTIFICATE OF APPEALABILITY**

18 A certificate of appealability may be issued by this Court or a circuit justice if
19 "the applicant has made a substantial showing of the denial of a constitutional right." 28
20 U.S.C. § 2253(C)(2) (West 2009). In order to satisfy this standard, an applicant must
21 show that "reasonable jurists would find the district Court's assessment of the constitu-
22 tional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Based
23 on the Court's preceding analysis, the Court concludes that jurists of reason could
24 differ with the Court's conclusion that Mr. Askham has failed to make a substantial
25 showing that he was denied a constitutional right. Thus, a certificate of appealability
26 should issue. Accordingly,

s/ Wm. Fremming Nielsen
WM. FREMMING NIELSEN
SENIOR UNITED STATES DISTRICT JUDGE